IN THE UNITED STATED DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
(Auburn/Syracuse Division)

Raoul XXXXX	:	
	:	
Petitioner,	:	
	:	
v.	:	Civil Case No.
	:	
Beth Ann YYYYY XXXXX	:	
	:	
Respondent	:	

RESPONDENT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS OR STAY THIS ACTION

Respondent Beth YYYYY-XXXXX ("YYYYY") respectfully submits this motion to dismiss or stay this action.

Preliminary Statement

Unlike the typical case under the Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention"), here the parties' settled expectation was to reside in the United States in the long run. Only Petitioner Raoul XXXXX's repeated acts of domestic violence and refusal to return to the United States have set an international stage for this proceeding. Having been born in the United States, and lived the majority of his young life in the United States, Valentino is entitled to remain here. At the very least, this Court should abstain in favor of the proceeding pending in state family court, which is familiar with the sort of issues that permeate this case.

STATEMENT OF FACTS

Respondent YYYYY and Petitioner are the parents of Valentino, the child at issue in this matter. Pet. for Return of Child to Pet'r ("Petition") at ¶ 4. In 2001, YYYYY and Petitioner

were married *in the United States*. *Id*. On February 11, 2002, Valentino was born *in the United States*. *Id.* at ¶ 8. Valentino has lived *in the United States* the vast majority of his young life.

Petitioner's Criminal Violence Against YYYYY and Their Child

Petitioner has violently assaulted YYYYY on numerous occasions throughout their relationship, many of which occurred in the presence in Valentino, and several of which were documented by law enforcement or governmental authorities.

In late January 2001, the Stamford Police Department in Connecticut arrested Petitioner for physically assaulting YYYYY in her apartment. On November 11, 2003, law enforcement in Armonk, NY arrested Petitioner for another violent assault on YYYYY. In the narrative of the Arrest Report, Officer James Thomas set forth his observations as follows:

> I was dispatched to 69 Nethermont Avenue for a 911 call for a domestic dispute with an injury to the victim. P.O. Scherf and myself arrived and the victim, Beth XXXXX, was standing outside of the house to the right of the front door. P.O. Scherf stopped to interview her while I entered the house to speak to her husband who was standing in the living room. He and I went inside the dining area to talk and I asked him what had transpired prior to our receiving a 911 call. Mr. XXXXX stated that he was in the shower and his wife entered the bathroom and she began to strike him about the body with a shower brush and he pushed her away and when she came at him again, he was able to get the shower brush away and he struck her in the head while defending himself. I asked Mr. XXXXX if I could see his back and stomach area for any signs of scratches or abrasions from the shower brush. He refused to let me examine him and he replied that his wife is small and could not cause scratches to him with the brush. P.O. Berwick entered the dining area and he stayed with Mr. XXXXX while I went to the foyer to speak with P.O. Scherf and Mrs. XXXXX.
>
> We had Mrs. XXXXX step outside and she stated that she was laying on the couch and her husband asked her to look up something on the internet. When she didn't respond immediately, her husband yelled at her in Italian, "Va Bo Ya", which means very well then. Mrs. XXXXX retrieved that item from the computer and went upstairs and found her husband in the shower. She said that she entered the bathroom and asked him what was so urgent and he pushed her causing her to fall into the door and causing an abrasion to her left ankle. She picked up the shower brush and he grabbed it from her hand and then struck her in the head as she was trying to exit the bathroom. She stated that she went to call 911 from the upstairs telephone and he came after her and she threw the telephone down and ran downstairs to call 911. Mrs. XXXXX was examined by medical personnel

> and exhibited a bump and swelling to the back of her head and an abrasion to her left ankle. Mrs. XXXXX refused medical attention at the scene and a RMA form was filled with Valhalla Ambulance personnel. Mrs. XXXXX was asked what she wanted and she replied that she wanted her husband out of the house. She was again asked what she wanted and she stated that she wanted him arrested.
>
> I went upstairs to examine the bathroom and observed the shower brush was broken with the handle by the doorway and the brush was inside the shower. I took photographs of the bathroom and then returned downstairs where Mr. XXXXX was advised that he was under arrest and was handcuffed by P.O. Scherf and then transported by P.O. Berwick in car 40.

Exhibit A (attached hereto). After his arrest, the court issued a six-month restraining order, prohibiting the Petitioner from further abusing YYYYY. Like many victims of domestic violence, however, YYYYY eventually allowed Petitioner to convince her to withdraw the allegations.

The Petitioner's recurrent physical and mental abuse of YYYYY culminated in a violent incident that occurred in Milan, Italy on June 26, 2006. That afternoon, the Petitioner became enraged to the point that he pushed YYYYY to the floor, punched and kicked her repeatedly, and threw objects at her, all which occurred in the presence of Valentino and placed him in physical and psychological danger. After the Petitioner left for work the next day, YYYYY and Valentino fled to the United States Embassy in Milan. The Embassy issued her an Emergency Repatriation Loan at which point YYYYY and Valentino escaped back to the United States.

State Court Proceeding

On November 22, 2006, YYYYY filed a Petition for Custody in the Family Court in Oneida County. *See* Exhibit B (attached hereto). The Family Court has ordered the parties to appear before it on December 6, 2006, with respect to custody matters. *Id*.

ARGUMENT

I. THE HAGUE CONVENTION CLAIMS SHOULD BE DISMISSED BASED ON THE PETITIONER'S FAILURE TO ALLEGE *FACTS* REFLECTING, AND HIS INABILITY TO PROVE, THAT VALENTINO'S HABITUAL RESIDENCE HAS BEEN ANYTHING OTHER THAN THE UNITED STATES.

Petitioner acknowledges that the Hague Convention applies only when a child is removed from the place of his or her "habitual residence." Without alleging any supporting facts in his Petition, the Petitioner merely alleges the legal conclusion that Valentino's habitual residence was Italy at the relevant time. Petition at ¶ 5. This Court need not accept allegations of legal conclusions as true when resolving a motion to dismiss. *Smith v. Local 819 I.B.T. Pension Plan*, 291 F.3d 236, 240 (2d Cir. 2002). Petitioner has failed to allege *facts* reflecting that the child's habitual residence was anything other than the United States.

The deficiencies in the pleading reveal that Petitioner fails to appreciate controlling Second Circuit precedent. This case is controlled by the two-prong test set forth *Gitter v. Gitter*, 396 F.3d 124 (2d Cir. 2005), a case remarkably like the present one for purposes of the habitual residence issue. The first prong of *Gitter* requires this Court to consider whether the parents shared a "mutual" intent to make Italy the child's "permanent home." *Id.* at 135 (citation omitted). In *Gitter*, the Second Circuit indicated that the trial court's rulings were supportable when it credited the mother's testimony and "found that Mr. and Mrs. Gitter 'only mutually agreed to move to Israel on a conditional basis—namely, that Mrs. Gitter would be satisfied with the new arrangements.'" *Id.* Under such circumstances, where one spouse traveled conditionally, the habitual residence of the child does not change, unless a petitioner can satisfy the second prong in *Gitter* by demonstrating that the child has "acclimatized" in the foreign country and thus acquired it as his habitual residence. *Id.*

In *Gitter*, the father persuaded the mother to try living in Israel for one year. *Id.* at 128. After eleven months in Israel, the mother returned to the United States temporarily. *Id.* The father convinced her to try Israel for another six months, which she did. *Id.* These facts are extremely similar to those in the present case, with the substitution here of Italy for Israel. Such conditional moves, not intended for a permanent or significantly indefinite duration, is simply insufficient to justify a change in the child's habitual residence.

Here, the family made less of a move to Italy than the *Gitter* parents made to Israel. In *Gitter*, the husband, as petitioner, demonstrated that the parties had, among other things, "closed their U.S. bank accounts and opened Israeli accounts, sold their cars in N.Y. and leased a new car in Israel, gave away their furniture that had been in storage and bought new furniture in Israel, and spent considerable time and money on renovations to his mother's house" in Israel. *Id.* at 135. In addition, the trial court found that the parties had enrolled the child in daycare in Israel. *Id.* at 128. Those facts were insufficient to preclude a finding that the United States remained the child's habitual residence. Here, the Petitioner has not even alleged, and cannot allege, such a combination of (insufficient) facts. Likewise, there are no allegations that Valentino became acclimatized in Italy because that never occurred.

Accordingly, neither the factual allegations in the Hague Convention petition, nor any relevant proof, could establish that Valentino's habitual residence was anything other than the United States at the relevant times.

II. THE HAGUE CONVENTION CLAIM SHOULD BE REJECTED BECAUSE VALENTINO FACES A GRAVE RISK OF PHYSICAL OR PSYCHOLOGICAL HARM, OR AN OTHERWISE INTOLERABLE SITUATION, IF THIS COURT WERE TO REQUIRE HIM TO RELOCATE TO ITALY.

Article 13(b) of the Hague Convention prevents the relocation of a child to a situation in which he would face a grave risk of physical or psychological harm, or an otherwise intolerable situation. Under the Hague Convention, children who have been wrongfully removed from their country of habitual residence should not be returned if "there is a grave risk that . . . return would expose the child[ren] to physical or psychological harm or otherwise place the child[ren] in an intolerable situation." Hague Convention, Art. 13(b).

The Second Circuit upheld an Article 13(b) defense in *Blondin v. Dubois*, 238 F.3d 153 (2d Cir. 2001). The *Blondin* court explained:

> The Hague Convention is not designed to resolve underlying custody disputes. *See* Hague Convention, art. 19. This fact, however, does not render irrelevant any countervailing interests the child might have. According to the Explanatory Report of the Convention,
>
> > the dispositive part of the Convention contains no explicit reference to the interests of the child…. However, its silence on this point ought not to lead one to the conclusion that the Convention ignores the social paradigm which declares the necessity of considering the interests of children in regulating all the problems which concern them. On the contrary, right from the start the signatory States declare themselves to be firmly convinced that the interests of the children are of paramount importance in matters relating to their custody….
>
> Elisa Pérez-Vera, *Explanatory Report: Hague Conference on Private International Law*, in 3 Acts and Documents of the Fourteenth Session 426 (1980) ("the "Explanatory Report" or "Report"), ¶ 23; *see generally Blondin II*, 189 F.3d at 246 n .5 (explaining why the Report is an especially useful aid to interpretation of the Convention). As the Report explains, Article 13(b) "clearly derive[s] from a consideration of the interests of the

> child…. [T]he interest of the child in not being removed from its habitual residence …. gives way before the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation." Explanatory Report at ¶ 29.

Id. at 161 (citation omitted).

The *Blondin* court cited with approval to *Walsh v. Walsh*, 221 F.3d 204 (1st Cir. 2000). *See Blondin*, 228 F.3d at 162, 164-65. Under *Walsh* and other cases, spousal abuse may create a "threshold showing of grave risk of exposure to physical or psychological harm." 221 F.3d at 220; *see also In re Application of Adan*, 437 F.3d 381, 396 n.6 (3d Cir. 2006) (recognizing that evidence of the father's abuse of the mother is relevant to whether a child's return would expose him to grave risk of harm). In *Walsh*, the First Circuit applied the 13(b) exception upon reviewing the risk to the respondent's children caused by their father's violent actions directed at third parties. 221 F.3d at 220-21. In order to meet her burden under the grave risk exception, the mother, as respondent, provided evidence that her husband had severely beaten her over the years, and that many of these beatings took place in the presence of her children. *Id*. This violent behavior demonstrated that the father's "temper and assaults are not in the least lessened by the presence of his two youngest children." *Id.* at 220. The majority of these incidents were directed at the respondent, and the First Circuit cited to "credible science literature establish[ing] that serial spousal abusers are also likely to be child abusers." *Id.* (citing Lee H. Bowker et al., *On the Relationship Between Wife Beating and Child Abuse, in* Kersti Yllo & Michele Bograd, *Feminist Perspectives on Wife Abuse* 158 (1988) ("A child who is exposed to violence in the home . . . is much more likely than the child raised in a nonviolent home to grow up and use violence against a child or spouse."); Susan M. Ross, *Risk of Physical Abuse to Children of Spouse Abusing Parents*, 20 Child Abuse and Neglect 589 (1996) ("The probability of child

abuse by a violent husband increases from 5% with one act of marital violence to near certainty with 50 or more acts of marital violence.")).

Noting that the Hague Convention "does not require that the risk be 'immediate'; only that it be grave," *Walsh*, 221 F.3d at 218, the *Walsh* court found the abuse of the respondent relevant to Article 13(b) given that "both state and federal law have recognized that children are at increased risk of physical and psychological injury themselves when they are in contact with a spousal abuser." *Id.* at 220. *See H.R. Con. Res. 172, 101st Cong.* (1990) (enacted) (stating that "the effects of physical abuse of a spouse on children include . . . the potential for future harm" and that "children often become targets of physical abuse themselves or are injured when they attempt to intervene on behalf of a parent."); *see also Custody of Vaughn*, 664 N.E.2d 434, 439 (Mass. 1996) ("There are significant reported psychological problems in children who witness domestic violence, especially during important developmental stages."); *Rodriquez v. Rodriquez*, 33 F. Supp. 2d 456, 461 (D. Md. 1999) (finding that "witnessing the abuse of another can be more emotionally traumatic then being the abused" and that returning the children to the habitual residence "even if it did not result in the children's physical abuse at the hands of their father, would result in psychological trauma because of the children's fear of physical harm"). Based on the risks to the children caused by their father's behavior, the First Circuit remanded the *Walsh* case with instructions to dismiss the father's petition under the Article 13(b) exception. 221 F.3d at 221.

Similarly, in *Van de Sande v. Van de Sande*, the Seventh Circuit considered the respondent's evidence of her husband's propensity for violence, including his frequent and serious beatings of his wife, as well as his verbal abuse and name calling. 431 F.3d 567, 570 (7th Cir. 2005). Both the physical and verbal abuse occurred in the presence of their children.

Id. Though the father never physically abused the son, he spanked the daughter on several occasions. *Id.* The court found that it would be "irresponsible to think the risk to the children less than grave" given the father's violent behavior in their presence. *Id*. The court emphasized that the "gravity of a risk involves not only the probability of harm, but also the magnitude of the harm if the probability materializes." *Id*. Though the children had yet to experience severe physical abuse, the Seventh Circuit concluded that "the probability that [the father] . . . would some day lose control and inflict actual physical injury on the children . . . could not be thought negligible." *Id.*

Attached hereto as Exhibit A is a criminal report regarding Petitioner's propensity for violence towards YYYYY. Based on this evidence, as well as the overwhelming evidence of chronic domestic violence, including violence in the presence of Valentino, which will be adduced at trial, Petitioner's Hague Convention claims cannot survive Article 13(b) of the Hague Convention because Valentino clearly faces a grave risk of physical or psychological harm, or an otherwise intolerable situation, if forced to relocate to Italy.

III. THIS COURT SHOULD ABSTAIN AND/OR STAY THIS ACTION PENDING RESOLUTION OF THE HAGUE CONVENTION ISSUES IN THE PENDING STATE COURT PROCEEDING.

Federal courts possess broad discretion to allow Hague Convention litigants to proceed in state court forums, which indisputably possess concurrent jurisdiction. In *Grieve v. Tamerin*, 269 F.3d 149 (2d Cir. 2001), the court affirmed a trial court's decision to abstain from and to dismiss a Hague Convention action where the petitioner was collaterally estopped from asserting whatever rights he may have had under the Hague Convention, having failed to raise them in a prior federal proceeding. *Id.* at 153-54; *see also Grieve v. Tamerin*, No. 00-CV-3824, 2000 WL 1240199, at * 3 (E.D.N.Y. Aug. 25, 2000) (holding that abstention was proper because of state's

strong interest in domestic relations matters generally and child custody questions in particular, and petitioner's failure to demonstrate that state court would not provide him with an adequate opportunity to litigate his claims under the Hague Convention).

Other courts have similarly found abstention proper in Hague Convention cases. *See Copeland v. Copeland*, 134 F.3d 362 (4th Cir. 1998); *Cerit v. Cerit*, 188 F. Supp. 2d 1239, 1251 (D. Haw. 2002); *cf. Aldogan v. Aldogan*, No. 04-1049, 2004 WL 489080, at *1 (1st Cir. Mar. 15, 2004) (finding no plain error and affirming abstention by district court that transferred petition to pending state court custody matter).

Although not discussed specifically by the Second Circuit in *Grieve* when it affirmed the trial court's decision to abstain, abstention can be particularly appropriate in Hague Convention cases in which interim child welfare issues are pending in state family court. *See* 42 U.S.C. §§11604(a) & (b) (2005) (empowering courts in Hague Convention cases to enter interim orders "to protect the well-being of the child involved," but preventing a change in physical custody of the child "unless the applicable requirements of State law are satisfied"). State family courts inherently possess a greater interest and experience in such interim child welfare issues. *See id.* at § 11604(b) (recognizing need for satisfaction of state laws on interim child welfare issues regarding physical custody of child).

Hence, if this Court does not dismiss this action, then the Court should abstain and stay all federal proceedings until the satisfactory resolution of the Hague Convention claims in the pending state court custody proceeding.

Conclusion

Based on the foregoing, the Hague Convention claims should be dismissed and the custody proceedings should proceed.

Respectfully submitted,

BETH ANN YYYYY XXXXX,

By her attorneys,

Diane Martin-Grande
LAW OFFICES OF DIANE MARTIN-GRANDE
301 Black River Blvd.
Rome, New York 13440
(315) 336-1410

Barry S. Pollack (BBO# 642064)
SULLIVAN & WORCESTER LLP
1290 Avenue of the Americas
New York, NY 10104
(212) 660-3000; fax: (212) 660-3001

Dated: December 6, 2006